MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

LEGISLATIVE POWER TO RESTRICT FREEDOM OF LABOR CONTRACTS.—The struggle between the police power of the legislature and the nineteenth century idea of due process of law continues unremittingly. That increasing social necessities and a more comprehensive and perfect conception of justice have resulted in recent years in restricting the "due process" clauses in federal and state constitutions to their historically and logically more correct meaning and scope there can be no doubt. Scores, if not hundreds, of decisions by our courts and conspicuously those of the United States Supreme Court have shown complete recognition of the fact that the formalism and the extreme individualism of earlier periods can only produce dangerous economic and social maladjustments in the complex and interlocking organization of our modern society. Cases taken from decisions of but a single term, such as *Riley* v. *Massachusetts,* (1914) 232 U. S. 671, 34 Sup. Ct. 469, 58 L. Ed. 788, in which was held valid a statute limiting the hours of labor for women in mechanical and manufacturing establishments; *German Alliance Ins. Co.* v. *Lewis,* (1914) 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, holding the business of fire insurance to be so far affected with a public interest as to justify legislative regulation of its rates; *Keokee Consol. Coke Co.* v. *Taylor,* (1914), 234 U. S. 224, 34 Sup. Ct. 856, 58 L. Ed. 1088, sustaining a Virginia

statute, in effect forbidding corporations to pay their laborers in anything except money or orders redeemable in money; *Sturges Mfg. Co.* v. *Beauchamp* (1913), 231 U. S. 320, 34 Sup. Ct. 60, 58 L. Ed. 245, upholding a statute prohibiting the employment of children under fourteen years of age in certain hazardous occupations; and *D. L. & W. Ry. Co.* v. *United States* (1913), 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269, sustaining a provision of the Hepburn Act of 1906, forbidding railway companies to transport in interstate commerce from market to mine commodities purchased by such companies for use in their private business of mining, are sufficient evidence of the appreciation by our highest court of the need of progressive legislation in the social interest, and of the presumptions which the judiciary should accord to legislative acts. They furnish moreover the most effective answer to the ill-considered demands of well-meaning and other agitators for such bungling and harmful proposals as those for the "judicial recall" and the "recall of decisions".

All the more regrettable therefore that the same high tribunal should have taken apparently a backward step in the important recent case of *Coppage* v. *Kansas*, 236 U. S. 1, 59 L. Ed.—— decided Jan. 25, 1915. Probably, however, it will prove to have been "but the loss of a single trench with the fight still raging unabated" to drop into the familiar language of the day. It must be admitted, too, that the statute involved was one to test the faith of any court in the legal propriety of legislation in the interest of the general welfare.

In this case the court said, "Upon both principle and authority, therefore, we are constrained to hold that the Kansas act of March 13, 1903, as construed and applied so as to punish with fine or imprisonment an employer or his agent for merely prescribing, as a condition upon which one may secure employment under or remain in the service of such employer, that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the 'due process' clause of the Fourteenth Amendment, and therefore void."

In reaching this conclusion which reversed the judgment of the Kansas Supreme Court, (87 Kan. 752), the court, so far as prior authority is concerned, relied principally upon *Adair* v. *U. S.*, 208 U. S. 171, 28 Sup. Ct. 277, 52 L. Ed. 436, a case which Mr. Justice HOLMES, dissenting in the Kansas case, frankly says should be repudiated, and upon decisions of like tenor by state courts upon more or less similar statutes of Missouri, Illinois, Wisconsin, New York and Minnesota.

Mr. Justice PITNEY, delivering the opinion of the court, argues that as an employer may discharge an employee because of his membership in a union or for any other reason or for no reason at all, therefore there should be no objection to requiring the employee to agree in advance not to join such a union as a condition of his employment; that the right of making contracts cannot be enjoyed at all except by parties coming together in an agreement that requires each to forego many things during the life of the contract. And he asks, "Is the employee's right to be free to join a labor union any more sacred or more securely founded upon the constitution than

his right to work for whom he will or to be idle if he will?" Continuing, Mr. Justice PITNEY declares that the portion of the statute in question bears no "possible relation to the public health, safety, morals or general welfare." The union as he says is a voluntary organization not charged with public or governmental duties such as would render the maintenance of their membership a matter of direct concern to the general welfare. The court admits (it could hardly do otherwise after such cases as *Holden* v. *Hardy*, 169 U. S. 366, 391; *Chicago, B. & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 566; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, and many others like them) that the right to contract may be restricted and limited by considerations of the general welfare. But, it argues, the present is merely an effort to level "inequalities of fortune by depriving one who has property of some part of what is characterized as his financial independence."

This it may be said is the thought which dominates the opinion of the court, that the statute in question is an effort to remove inequalities of fortune or of opportunity and that it is such an interference with the normal exercise of personal liberty and freedom of contract as to result in a deprivation of liberty and of property without due process of law.

Mr. Justice HOLMES dissents in a brief opinion on the ground that if to reasonable men it may seem that only by belonging to a union can the laborer secure a contract that shall be fair to him, then the right to belong to such a union may be "enforced by law in order to establish the equality of position between the parties in which liberty of contract begins." And he then refers for elaboration of this argument to his dissenting opinions in *Adair* v. *United States* (supra) and *Lochner* v. *N. Y.*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937. Criticism of the opinion of the court in the Kansas case may well rest on these broad grounds.

Mr. Justice DAY, with whom Mr. Justice HUGHES concurs, also filed an able dissenting opinion in which he first distinguishes the case from the *Adair* case, in which he was with the majority of the court. In last analysis, however, the question whether the majority or the dissenting minority of the court were right in the Kansas case must rest upon the answer to the question: has the legislature the legal right to inquire whether there is actual liberty, actual freedom of permissible contract for its citizens or any great class of them, or must its hand be stayed upon proof that a nominal or formal liberty with reference to contracts, especially those of employment, exists? The formula that if the laborer has the same right to accept or reject a proffered contract of employment which the employer has, then there is liberty or freedom of contract, has a plausible sound. But to anyone familiar with modern industrial and social conditions it is but a hollow saying. The vast majority of laborers must accept such contracts and conditions of labor as are offered to them or starve. Is that the liberty, the freedom of contract, which the fourteenth amendment guarantees? Or, on the other hand, has the state the power to enact legislation which will tend to place the laborer in a position in which there will be some margin of safety within which he may bargain with his prospective employer for a contract fair to both of them? That is the gist of the whole question. It is

submitted that the Supreme Court over and over again has declared that the state has the power contended for and sought to be utilized in the statute in question. It would be superfluous to heap up citations of cases to this effect decided during the last few years, but the case of *Muller* v. *Oregon*, (1908), 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, in which was sustained a statute forbidding the employment of women in any mechanical establishment, factory or laundry for more than ten hours during any one day, may be mentioned as an illustration. To be sure, in that case the court found that the law had direct relation to public health. But the public welfare is as much within the scope of the police power as public health. The only question for the court then would seem to be: can it say that the statute in question could not seem to a reasonable person to bear any relation to the public welfare? It may well be that the statute will not produce the desired results. It may be that there are other and better methods of accomplishing those results. It may be that the union is not a desirable and beneficent social agent, but, as Mr. Justice DAY points out, many states have adopted statutes for the organization of unions and hence have presumably recognized that they may be beneficial. Certainly they profess to work for the advancement of the legitimate interests of a very large class of the people. But whether such organizations seem good or bad to the court is aside from the question, for as the Supreme Court itself has said in *Erie R. R. Co.* v. *Williams* (supra), the earnest conflict of serious opinion does not suffice to bring it (the action of the legislature) within the range of judicial cognizance. Can judges conscientiously assert that reasonable men cannot believe that membership in a union does not tend to place employees porations than they would be in without such membership, and by so doing to contribute to the general welfare? And why is the case not well within the reasoning and the principle of *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, in which was sustained a statute compelling all state banks in Oklahoma to contribute to a guaranty fund for the benefit of depositors?

The theory upon which the statute is framed would seem to be one susceptible of being invoked in aid of the general welfare to prevent unreasonable demands by either employers or employees. It is by no means certain that unions will not in the future acquire such influence and power as to enable them, unless actuated by the best motives, seriously to threaten interests of the employers which are vital to the welfare of the entire community. It may well be that the principle upon which the statute was founded might be invoked *e converso* to promote the general welfare by protecting employers against the unreasonable demands of unions, should they grow so strong as otherwise to be enabled to enforce such demands. H. M. B.

DISCHARGE IN BANKRUPTCY OF PRINCIPAL'S INCHOATE OBLIGATION TO INDEMNIFY HIS SURETY.—In the recent case of *R. P. Williams, et al.* v. *United States Fidelity and Guaranty Company*, 35 Sup. Ct. 289, the United States Supreme Court has at last passed upon a question that has vexed the courts